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Supreme Court, U.S.
FILED

07-881 DEC 21 2007

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RECORDS AND BRIEFS

No.

IN THE SUPREME COURT OF THE UNITED STATES

LESLIE ANN MELTON
f/k/a LESLIE ANN FREDMAN,
Petitioner,

and

DAVID LYNN FREDMAN
Respondant,

APPENDIX

To Petition for a Writ of Certiorari to the District Court of Appeal of the State of Florida, Second District

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APPENDIX A

Decision of State District Court of Appeals

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

Case No. 2D06-1674

LESLIE ANN FREDMAN,
n/k/a LESLIE ANN MELTON,
Appellant,

v.

DAVID LYNN FREDMAN,
Appellee.
/

Opinion filed June 20, 2007.
Appeal from the Circuit Court for Hillsborough County; Monica L. Sierra, Judge.
Allison M. Perry of Law Office of Allison M. Perry, P.A., Tampa, for Appellant.
Robert M. Geller of Law Offices of Robert M. Geller and Associates, Tampa, for Appellee.

SILBERMAN, Judge.

In this post dissolution proceeding, Leslie Ann Fredman, n/k/a Leslie Ann Melton (the Mother), appeals a final order denying her supplemental petition and prohibiting her from relocating with the parties' two children

to Texas. She contends that section 61.13(2)(d), Florida Statutes (2004), the parental relocation statute,[1] is unconstitutional because it abridges her fundamental rights to privacy and travel and violates her right to equal protection of the law. She also contends that the trial court abused its discretion in denying her request to relocate to Texas. We affirm, holding that the statute is constitutional on its face and that the trial court did not abuse its discretion in denying her request to relocate.

The Mother and David Lynn Fredman (the Father) have two sons, born December 21, 1994, and December 22, 1997. The parties divorced in October of 2002, and the final judgment of dissolution of marriage incorporated the parties' marital settlement agreement (MSA). The parties have shared parental responsibility, with the Mother being the primary residential parent and the Father having liberal visitation, specifically including a minimum of one night per week and every other weekend. The MSA and the final judgment do not contain a restriction on the Mother's relocation with the children. At the time the parties entered into the MSA and

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[1] The legislature significantly amended the parental relocation statute and moved it to section 61.13001, effective October 1, 2006. See Ch. 2006-245, §§ 2, 4, at 2017-22, Laws of Fla. The parties did not mention the new statute in their briefs, and the trial court's orders were entered prior to the amendment, pursuant to section 61.13(2)(d). Thus, this opinion does not address section 61.13001.

provided for the specific visitation, the Mother had a relationship with Mike Melton, whom she later married.

The Mother and Mr. Melton met while he was working on a project in Florida for an extended time. Mr. Melton lives in Ponder, Texas, with his son, and he now works in Ponder. The Mother works in Hillsborough County, Florida, and lives with the parties' two sons in a two-bedroom apartment in Brandon, Florida. On January 23, 2004, the Mother filed a supplemental petition seeking to modify the Father's visitation because she would be marrying Mr. Melton and relocating with the children to Mr. Melton's home in Ponder, Texas. Upon the Father's motion for injunctive relief, the court entered a temporary injunction prohibiting the Mother from moving the children to Texas.

At the final hearing in November 2004, the Mother testified to the benefits of moving the children to the small community of Ponder, Texas, particularly Mr. Melton's new 3000-square-foot home and the amenities at the nearby public school. The Mother testified that she earns $58,000 per year and has the possibility for advancement at her current Florida employment. The Mother testified that she planned to be a stay-at-home mom in Ponder, but if necessary she could find comparable employment there. The only people her children know in Ponder are Mr. Melton and his son. The Mother has no family in Ponder; her family lives in Oklahoma, two and

one half hours away from Ponder.

Mr. Melton testified that he worked in the oil and gas industry as a right-of-way agent, that he earned $70,000 to $90,000 per year, and that he could not find employment in his field of work in Florida.

The Father testified that he works a night shift from 11:00 p.m. to 7:30 a.m., that he exercised visitation with his children on Tuesdays and every other weekend, and that when he did not exercise visitation it was due to his work schedule. Since the Mother filed the supplemental petition, he has increased the overnight visitation because his new wife is home while he is working at night. The Father picks the children up from school on the days he has visitation. He testified that he helps them with their homework and that he enjoys recreational activities with his sons, including bowling and fishing.

The Father has extended family in Hillsborough County, including his mother, grandmother, uncles, aunts, and cousins. The Father testified that the children have seen their grandmother at least once a week throughout their lives. The Father sees his family every weekend, and the children have frequent contact with them, enjoying "boating, fishing, swimming, and just hanging out as a family" at their grandmother's home. The Father's family is also involved in a bowling league in which the children and the Father participate, so that the children spend time with the Father and his family on Tuesday

nights. Furthermore, the Father testified that both the Father and the Mother attend the children's bowling league on Saturdays.

On December 10, 2004, after a final hearing, the trial court rendered an order applying the factors in section 61.13(2)(d) regarding relocation and denying the Mother's request for modification of visitation. On appeal, this court reversed and remanded for the trial court to use the proper legal standard set forth in section 61.13(2)(d)(4) regarding the proposed substitute visitation for the Father. See Fredman v. Fredman, 917 So. 2d 1038 (Fla. 2d DCA 2006). On remand, the trial court reconsidered that factor, and in an order rendered March 24, 2006, found that the proposed visitation plan was "adequate to foster a continuing, meaningful relationship between the children and the Father" but found, considering all the factors, that the move was not in the children's best interest. Thus, the trial court denied the Mother's supplemental petition and her request to relocate. The Mother now appeals from the trial court's March 2006 order.

1. CONSTITUTIONALITY OF RELOCATION STATUTE

Although the Mother did not raise the constitutionality of the relocation statute in the trial court, she challenges the facial constitutionality of the statute on the ground that application of the allegedly

unconstitutional statute constitutes fundamental error which she can raise for the first time on appeal. See State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993) ("A facial challenge to a statue's constitutional validity may be raised for the first time on appeal only if the error is fundamental."); B.C. v. Dep't of Children & Families, 864 So. 2d 486, 491 (Fla. 5th DCA 2004) (recognizing that the facial unconstitutionality of a statute may be raised for the first time on appeal but that the unconstitutional application of a statute to a particular set of facts may not be raised for the first time on appeal). The constitutionality of the relocation statute appears to be a question of first impression in the State of Florida. We emphasize, however, that this opinion does not address the significantly amended version of the relocation statute in section 61.13001 but applies only to the version of the statute in section 61.13(2)(d).

Section 61.13(2)(d) provides as follows:

> No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to remove the child and the move will materially affect the current schedule of contact and access with the secondary residential parent. In making a determination as to whether the primary residential parent may relocate with a child, the court must consider the following factors:
>
> 1. Whether the move would be likely to improve the general quality of life for

both the residential parent and the child.

2. The extent to which visitation rights have been allowed and exercised.
3. Whether the primary residential parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.
4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent.
5. Whether the cost of transportation is financially affordable by one or both parties.
6. Whether the move is in the best interests of the child.

The constitutionality of a statute is reviewed de novo; however, a legislative enactment comes to the reviewing court with a presumption of constitutionality, and the reviewing court should, if possible, construe a statute in a manner resulting in a constitutional outcome. Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005). When the legislature enacted section 61.13(2)(d), Florida Statutes, in 1997, it provided, "No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent." See Ch. 97-242, §

1, at 4436, Laws of Fla. That provision effectively overruled the Florida Supreme Court's decisions in Mize v. Mize, 621 So. 2d 417 (Fla. 1993), and Russenberger v. Russenberger, 669 So. 2d 1044 (Fla. 1996), which provided that when a primary residential parent is seeking in good faith to relocate, there is a rebuttable presumption in favor of the request to relocate. See Russenberger, 669 So. 2d at 1047. The Mother contends that this standard was one of constitutional dimension and that by removing the presumption in favor of relocation, the relocation statute "is a clear violation of numerous constitutionally protected rights." Specifically, the Mother raises the right to privacy, the right to travel, and equal protection.

Right to Privacy

The mother contends that the relocation statute violates a primary residential parent's right to privacy because it empowers the State to dictate where the primary residential parent may or may not live. See Art. I, § 23, Fla. Const. (providing "the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein"); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998) (recognizing parent's fundamental right to privacy in childrearing decisions and holding grandparent visitation statute unconstitutional). The argument regarding her fundamental right to privacy seems to be very similar to her argument regarding her

fundamental right to travel because the privacy argument is based on her right to choose where she lives. Thus, the discussion on her right to travel will encompass her right to choose where she lives.

To the extent that the mother is arguing that she has a fundamental right as a parent to decide where her children live, she must recognize that the father shares the same fundamental right. The Von Eiff court stated that when a governmental regulation implicates a privacy interest, the State must establish "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." 720 So. 2d at 514 (quoting Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985)). In Winfield, however, the Supreme Court explained that "before the right of privacy is attached and the delineated standard applied, a reasonable expectation of privacy must exist." 477 So. 2d at 547. In City of North Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995), the court stated that the Florida right to privacy "is circumscribed and limited by the circumstances in which it is asserted." The court determined that an applicant for a government job did not have a reasonable expectation of privacy in the disclosure on a job application of whether she was a smoker. Id. The court therefore determined that the circumstances did not implicate Florida's right of privacy. Id.

Unlike Von Eiff, where a parent asserted his privacy right regarding childrearing decisions against third parties (the grandparents), here, the Mother asserts her right to make childrearing decisions against the Father. The final judgment of dissolution of marriage provides that the parties have shared parental responsibility as to the children and that the Mother is the primary residential parent. As primary residential parent, the Mother does not make all childrearing decisions. Rather, section 61.046(15) defines "shared parental responsibility" as "a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly." It is obvious that what school a child attends and in what state a child lives are major decisions affecting the child's welfare. Therefore, when the parties agree to shared parental responsibility in the marital settlement agreement and a court order provides for shared parental responsibility, we conclude that the Mother does not have a reasonable expectation of privacy to decide in what state her children live, with respect to the Father, although she would have a reasonable expectation of privacy as to a third party. Thus, in this particular circumstance, the Mother's right to privacy is not implicated.

Right to Travel

The Mother contends that the relocation statute violates her fundamental right to travel by requiring her to obtain court permission to relocate to another state. The United States Supreme Court has "long 'recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." Saenz v. Roe, 526 U.S. 489, 499 (1999) (quoting Shapiro v. Thompson, 394 U.S. 618, 629 (1969), overruled in part on other grounds by Edelman v. Jordan, 415 U.S. 651 (1974)); see also State v. J.P., 907 So. 2d 1101, 1112 (Fla. 2004) ("The freedom to travel throughout the United States and the freedom of movement have been recognized as basic rights under the federal Constitution.") Here, the relocation statute does not prevent the Mother from relocating to another state, but it does restrict her in moving with the parties' children to another state. In Shapiro, the Court recognized that "[i]f a law has 'no other purpose * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it (is) patently unconstitutional.'" 394 U.S. at 631 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)). In applying this concept to a relocation case, the New Mexico Supreme Court stated that "it makes no difference that the parent who wishes to relocate is not prohibited

outright from doing so; a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether." Jaramillo v. Jaramillo, 823 P.2d 299, 306 (N.M. 1991) (citing Shapiro, 394 U.S. at 631). In In re Marriage ofCiesluk, 113 P.3d 135, 142 (Colo. 2005), the Colorado Supreme Court, citing Jaramillo and Shapiro, determined that although the Colorado statute at issue "does not prohibit outright a majority time parent from relocating, it chills the exercise of that parent's right to travel because, in seeking to relocate, that parent risks losing majority parent status with respect to the minor child."

The Colorado Supreme Court in Ciesluk discussed the competing interests involved in a relocation by the "majority time parent" and the different approaches courts have taken on the subject. There, an amendment to a Colorado statute replaced a case law "presumption in favor of the majority time parent with a liberal fact-driven analysis." Id. at 141. Like the present case, the mother in Ciesluk argued that by removing the presumption in favor of relocation, the amended statute "discourages her from relocating, and unconstitutionally infringes upon her right to travel." Id. at 142. Ciesluk recognized, however, that it is not only the relocating parent's fundamental right to travel that is at stake. "In addition, a minority time parent has an equally important constitutional

right to the care and control of the child." Id. (citing Troxel v. Granville, 530 U.S. 57, 65 (2000) (reiterating the fundamental liberty interest that parents have "in the care, custody, and control of their children")). Furthermore, intertwined with the parents' competing rights is the concern for the best interests of the child. Ciesluk, 113 P.3d at 142. "Thus, relocation disputes present courts with a unique challenge: to promote the best interest of the child while affording protection equally between a majority time parent's right to travel and a minority time parent's right to parent." Id.

The Ciesluk court considered and rejected the approach by the Wyoming Supreme Court in Watt v. Watt, 971 P.2d 608 (Wyo. 1999), that a custodial parent's right to travel and to relocate the children is not to be denied unless there is a substantial and material change in circumstances and unless detriment to the child can be shown. Ciesluk, 113 P.3d at 143. We agree that this approach fails to take into consideration the other parent's fundamental right to parent, and the Florida relocation statute's fact-driven approach balances all interests, including the best interests of the child.

The Ciesluk court also considered and rejected the approach by the Minnesota court in LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000), which determined that the deprivation of the right to travel was justified by a compelling state interest: the best

interests of the child. Ciesluk, 113 P.3d at 144-45. Although this approach has some appeal because the best interests of the child generally is a paramount concern, the Florida Supreme Court has held, albeit in a different context, that the best interests of the child is not a compelling state interest. In Von Eiff, the supreme court held a grandparent visitation statute unconstitutional. 720 So. 2d at 517. The court determined that the statute infringed on the parents' right to privacy, which includes the right to make childrearing decisions. Id. at 513-14. To justify an intrusion on the right to privacy, the State had to demonstrate "that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." Id. at 514 (quoting Winfield, 477 So. 2d at 547). The court determined that the best interests of the child was not a compelling state interest; rather, " 'the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm.' " Id. (citation omitted). The Von Eiff court noted that it did not intend to disrupt the best interest standard in other areas of family law. Id. at 514 n.3. Of course, Von Eiff is factually distinguishable in that the father and adoptive mother's right to raise their child was pitted against the desire for visitation by third parties, the maternal grandparents. Here, the Mother and the Father have competing rights.

The Colorado court in Ciesluk placed much emphasis on these competing rights,

ng with the State's concern for the best erests of the child, and chose to adopt the w Mexico Supreme Court's approach in amillo. 113 P.3d at 146. The Jaramillo court ermined that in a joint custody situation, a ent wishing to relocate should not be dened by an adverse presumption. 823 P.2d 305. It also determined that the resisting ent should not be burdened with a sumption in the relocating parent's favor, ause the resisting parent has a fundamental erty interest in parenting. Id. at 306. Instead, court concluded that

> neither parent will have the burden to show that relocation of the child with the removing parent will be in or contrary to the child's best interests. Each party will have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests.

at 309.

The Ciesluk court determined that in olying the Colorado statute, a court is not to ke a presumption in favor of or against ocation and that neither party has a burden proof. Rather, " 'both parents share equally

the burden of demonstrating how the child's best interest will be served.' " 113 P.3d at 147 (quoting Jaramillo, 823 P.3d at 308). The court has the duty to consider and make findings on the twenty-one factors set out in the Colorado statute, with the focus on the child's best interests. Id. At 147-48. Therefore, the Colorado court balanced the two competing fundamental rights, along with the child's best interests, and determined that if neither party had a presumption or burden of proof, the rights were appropriately balanced and the child's interests taken into account.

Here, the Florida relocation statute expressly states that there is no presumption in favor of or against relocation. Because the Father's constitutional rights must also be considered, we reject the Mother's argument that the lack of a presumption in favor of the Mother is unconstitutional. Further, section 61.13(2)(d) is silent as to the burden of proof. See Gerov v. Holter, 731 So. 2d 152, 153 (Fla. 4th DCA 1999); see also Bartolotta v. Bartolotta, 703 So. 2d 1229, 1230 n.1 (Fla. 4th DCA 1998) ("Although there is no longer any presumption favoring relocation, the burden of proof as to whether a relocation meets the statutory criteria is not addressed by the statute.") When a primary residential parent seeks to relocate a child, section 61.13(2)(d) requires the court to consider all the statutory factors without any presumptions in favor of either party. The factors address, among other things, the relocating parent's quality of life, the other

arent's ability to maintain a meaningful lationship with the child, and the child's best terests. See § 61.13(2)(d)(1), (4), (6). Thus, the location statute requires the court to nsider the competing interests, with an propriate focus on the parents' rights, along ith the best interest of the child. Therefore, e statute does not violate the Mother's right travel.

Equal Protection

The Mother contends that the relocation atute violates the Equal Protection Clause of e Fourteenth Amendment to the Constitution ecause it discriminates against primary sidential parents. She argues that primary sidential parents must obtain permission to locate, while secondary residential parents eed not obtain permission to relocate from the ea where their child resides. The Mother tes no equal protection cases in her gument. An equal protection analysis is propriate only if similarly situated dividuals are treated differently. "Equal otection is not violated merely because some ersons are treated differently than other ersons. It only requires that persons similarly tuated be treated similarly." Troy v. State, 948 . 2d 635, 645 (Fla. 2006) (quoting Duncan v. oore, 754 So. 2d 708, 712 (Fla. 2000)). In a allenge to a Nevada relocation statute on ual protection grounds, the Nevada Supreme ourt recognized that custodial and oncustodial parents are not similarly

situated. Reel v. Harrison, 60 P.3d 480, 483 (Nev. 2002). The court explained that if the noncustodial parent did not consent to the move, the Nevada statute required the custodial parent to obtain court permission to move with the child. The Nevada Supreme Court, quoting from its earlier opinion in Schwartz v. Schwartz, 812 P.2d 1268, 1270 (Nev. 1991), noted the statute's purpose was " 'to preserve the rights and familial relationship of the noncustodial parent with respect to his or her child.' " Reel, 60 P.3d at 483 (footnote omitted).

Here, the Mother, as the primary residential parent, must obtain permission to relocate with the children because relocation would affect the secondary residential parent's fundamental right to parent and would limit the Father's access to the children. However, if the Father chooses to relocate out of state, it does not deny the Mother access to her children. Thus, to the extent that a primary residential parent must seek court permission to relocate, the parties are not similarly situated; thus, the statute does not violate the Equal Protection Clause. Therefore, we conclude that the statute is constitutional on its face.

2. DENIAL OF REQUEST TO RELOCATE

The Mother contends that, in applying section 61.13(2)(d), the trial court abused its discretion in denying her relocation request on

remand following the earlier appeal. The standard of review regarding a trial court's order on relocation is abuse of discretion. Botterbusch v. Botterbusch, 851 So. 2d 903, 904 (Fla. 4th DCA 2003). Competent, substantial evidence must support the trial court's findings as to the factors in section 61.13(2)(d) that the trial court must consider in making its determination. See Berrebbi v. Clarke, 870 So. 2d 172, 173 (Fla. 2d DCA 2004); Botterbusch, 851 So. 2d at 904. Here, the record reflects competent, substantial evidence to support the trial court's findings, and we cannot say that the trial court abused its discretion in denying the Mother's request to relocate to Texas.

In this court's prior opinion in Fredman v. Fredman, 917 So. 2d 1038, 1041 (Fla. 2d DCA 2006), we reversed and remanded for the trial court to again consider the mother's proposed relocation under section 61.13(2)(d), with directions to use the proper standard as stated in section 61.13(2)(d)(4): "Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent." In its new order, rendered on March 24, 2006, the trial court found that the Mother's proposed substitute visitation schedule "would be adequate to foster a continuing, meaningful relationship between the children and the Father." The trial court adopted the findings in its previous order rendered December 10, 2004, except paragraph 13, which had used the improper standard regarding substitute

visitation. Although the court found that the substitute visitation would be adequate, the trial court again denied the relocation request. After considering the statutory factors discussed in the 2004 order and the visitation factor that it reconsidered under the proper standard, the court concluded

> that relocation would not be in the best interest of the children, even though it may be in the best interest of the Former Wife and her new husband. The Court finds that the proposed relocation does not benefit the children inasmuch as there has not been a showing that the proposed relocation would improve the children's school, family or even home life. See Berrebbi v. Clarke, 870 So. 2d 172, 173 (Fla. 2d DCA 2004).

In its findings, the court recognized that the family would live in a 3000-square-foot home in Texas and that the Mother currently lives in a two-bedroom apartment in Hillsborough County. On cross-examination, however, the Mother admitted that one could find a house in Hillsborough County, Florida, at a cost comparable to the cost of the home in Ponder. The Father also testified that there were homes available in his community in Brandon at a cost comparable to Mr. Melton's home in Ponder.

With respect to schooling, the court found that although the Mother contended that the children would be in a better school in

Texas, the Father testified that comparable public schools are available in Hillsborough and that the children were doing well in their present school. The Mother had testified to all the facilities that the children's small private school in Brandon did not have, but she admitted on cross examination that good public schools were available in Hillsborough County.

With respect to family life, the court recognized both parents' involvement with the children's sport activities. However, the court emphasized that the Father is actively involved with the children and that he and the children share a "passion for bowling." The court also recognized that the children have frequent contact with the Father's relatives in Hillsborough County, including the Father's mother, grandmother, uncles, aunts, and cousins. The Mother has no family in Texas, and the court noted that Mr. Melton's extended family does not reside in Ponder, Texas. In fact, it appears that the children know no one in Ponder other than their stepfather and stepbrother. This is in stark contrast to the excellent relationship that the children have with the Father's family in Hillsborough County.

The trial court recognized that the move would improve the home life for the Mother and her new husband. However, in Berrebbi, this court reversed an order that allowed relocation, stating that "[a]ny evidence regarding the benefits of relocation related to

the Mother and her new husband" and that there was no evidence that relocation would be good for the child. 870 So. 2d at 173. Here, the Mother believed that relocation would provide certain benefits for the children. However, the Father presented contrary evidence, as well as evidence reflecting that the children's best interests would be served by allowing them to remain in Hillsborough County. Based on this record, we cannot say that the trial court abused its discretion in denying the Mother's request to relocate with the children to Texas.

Affirmed.

WHATLEY and KELLY, JJ., Concur.

APPENDIX B

Decision of State Trial Court

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, N AND FOR HILLSBOROUGH COUNTY, FLORIDA

Case No.: 02-12576
Division: C

LESLIE ANN FREDMAN
Petitioner,

and

DAVID LYNN FREDMAN,
Respondent.
/

ORDER

This cause came before this Court on a ner Wife's Supplemental Petition for ification and Former Husband's plemental Petition heard on November 22 23, 2004. Present for the hearing was the ner Wife, her attorney, the Former band and his attorney. The Court, having ewed the file, heard the testimony ented, and being otherwise fully advised, es these findings of fact and reaches these clusions of law:

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CTION I. FINDINGS

The Court has jurisdiction over the subject matter and the parties, and the minor children of the parties, Joshua Lynn Fredman, born December 21, 1994, and Jared Lee Fredman, born December 22, 1997.

The last order establishing parental responsibility and visitation was entered on October 14. 2002, which ratified Marital Settlement Agreement dated July 29, 2004.

Section III, Paragraph 4 of the Marital Settlement Agreement provided for the Father to have "possession of the child(ren) at any and all times mutually agreed to by the Mother in advance, and in the absence of mutual agreement, shall have possession of the child(ren) under the specified terms set out below:

Regularly Scheduled Visition: Liberal visitation to include a minimum of one day/night per week and every other weekend from 7:00 p.m. Friday until 7:00 p.m. Sunday.

Holidays/Vacations:
Christmas/Even years - From 7:00 p.m. Christmas Eve day until 1:00 p.m. Christmas Day.
Christmas/Odd years - From 1:00 p.m. Christmas Day until 7:00 p.m. Christmas Day.

New Year's Eve - Odd years from 7:00 p.m. New Year's Eve until 7:00 p.m. on said day.
Thanksgiving Day - Odd years from 7:00 p.m. the night before until 7:00 p.m. on said day,
Spring Break - Even years.
Father's Day - If not on a regularly scheduled weekend visit, then from 9:00 a.m. until 7:00 p.m. on said day.
Labor Day - Odd years, from 7:00 p.m. Friday night to 7:00 p.m. Monday night.
Memorial Day - Even years, from 7:00 p.m. Friday night to 7:00 p.m. Monday night.
Independence Day - Odd years if not on a regularly scheduled weekend visit, then from 7:00 p.m. the night before until 7:00 p.m. on said day.
Summer - Two consecutive weeks (14-days) of the father's choice during summer break from school.

4. **The Mother filed a Verified Supplemental Petition to Modify Visitation, Child Support and Other Relief on January 23, 2004, alleging at Paragraph Three "[t]he substantial change is that the Former Wife will be getting married and relocating with the children to the state of Texas." The Mother seeks to modify the visitation to allow the Father to have eight weeks summer visitation, alternating holidays, one telephone call per week, as well as liberal visitation between the Father and the children if the Father travel to Texas.**

5. **The Father filed a Verified Emergency**

Motion for Injunctive Relief on March 4, 2004, requesting the Mother be enjoined from relocating with the minor children until the final hearing on the supplemental petition.

The Court entered a temporary injunction after hearing on March 5, 2004 restricting the permanent relocation of the children from the State of Florida until further order of court. This order was not appealed and governs the parties.

The Mother has argued that the Court does not have jurisdiction to consider the issue of relocation because the Father failed to file a supplemental petition raising the issue of a geographical restriction on the permanent residence of the minor children and no restriction was contained in the Final Judgment.

The Court found that it has jurisdiction to consider the issue of relocation. The Mother inherently raised the issue of relocation in her Supplemental Petition by alleging the basis of the substantial change in circumstances to include relocating with the children to the state of Texas. Additionally, the Father raised relocation as an issue in the Verified Motion for Temporary Injunction, which is the basis for the Order dated March 5, 2004 which restricts relocation and currently governs the parties.

9. In addition to considering the credibility of the witnesses, the Court considered the factors of Florida Statute Section 61.13(2)(d) to determine whether the Mother may relocate the minor children to the State of Texas.

10. Whether the move would be likely to improve the general quality of life for both the Mother and the minor children.

    a. The Mother remarried her current husband after the date of filing the supplemental petition. The Mother and her new husband have built a three thousand square foot home in Ponder, Texas that was finished in August of 2004.

    b. The Mother is currently working in Hillsborough County, Florida as a business process analyst at MP Total Care, Inc. earning approximately $58,000.00 per year. The Mother testified that there is room for advancement at her employment due to the company's growth. However, she would like to relocate to Texas where her new husband resides, where she can be a stay-at-home mom.

    c. Mike Melton, the Mother's current husband, testified that he met the Mother while he was working in the State of Florida under a contracting position. He was residing in a single family home in Hillsborough County at the time. Mr.

Melton is currently employed as a right-of-way agent in the field of oil and gas and currently earns $70,000.00 to $90,000.00 per year. Mr. Melton indicated that he inquired in the State of Florida for a comparable position as a right-of-way agent in oil and gas, but no positions were available. He made no other inquiry for employment in the State of Florida.

d. The Mother and the minor children moved into an apartment at the time of separation from the Father in July of 2002 and currently reside in an apartment. The Mother argued that the quality of life for her and her children will improve with the move to Texas because they will be living in a home, rather than an apartment, living in a small rural community and the cost of living is lower. However, little data was provided on the actual cost of living in Ponder, Texas compared to the cost of living in Hillsborough County, Florida. For example, no evidence was provided to indicate Mr. Melton and the mother cannot afford to live in a single family home in Hillsborough County or that no single family homes are available in Hillsborough County.

e. The Mother argued that the children will be in a better school in Texas, however, testimony was offered by the Father that the children are doing well in their

present school and comparable public schools are available in Hillsborough County, Florida.

f. All of the Father's relatives, including his mother, grandmother, uncles, aunts and cousins, reside in Hillsborough County and the children have frequent and continued contact with these extended family members. The Mother has no relatives in the State of Texas, other than Mr. Melton's family, who do not reside in Ponder, Texas.

g. The Court concludes that the general quality of life for the Mother and the childrer would be substantially the same in Ponder, Texas as in Hillsborough County, Florida.

11. The extent to which the visitation rights have been allowed and exercised. It was the undisputed testimony that the only time that Father has failed to exercise visitation with the children was if he was unable to get off of work. Both parents are involved in the children's weekend sporting activities and both attend the children's sporting events. Similarly, the Father and the children share a passion for bowling and jointly participate in bowling every Tuesday. Both parties testified that they had no difficulty coordinating visitation until the filing of the Supplemental Petition in January of 2004. After the filing of the petition, the co-

parenting appears to have become strained, such that the Mother has not allowed the Father additionally requested visitation and the Father has begun using all three days of the alternating weekends and leaving.the children with his fiance/wife on the days that he works.

Clearly, some tension exists between the Father and Mr. Melton, which may cause difficulty in co-parenting between the Mother and the Father.

12. Whether the Mother, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements. No evidence was presented to indicate that the Mother would not comply with any substitute visitation arrangements.

13. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the children and the Father. The Court finds this Father to be intimately involved with his children, as evidenced by the weekly contact every Tuesday evening, when he takes the children bowling. Additionally, anytime that the Father is not working on a weekend, he attends the sporting activities of the children, even if it is not his weekend to care for the children. The substitute visitation offered by the Mother will be inadequate to foster a continuing meaningful relationship at the same level

that currently exists between the Father and the minor children.

14. Whether the cost of transportation is financially affordable by one or both parties. The Mother has offered to pay the cost of transportation of the children to Florida for the visits outlined in paragraph four, above. However, the Father would need to pay the cost of any additional visitation in Texas, which appears to be economically unfeasible.

15. Whether the move is in the best interests of the children. The Court concludes that the move will not be in the best interest of the children.

16. Furthermore, the Court considered that the Mother has been romantically involved with her current husband, Mike Melton, since Easter of 2001, through the date of this hearing. It appears that both parties knew of this romantic interest, as well as the fact that Mr. Melton resided outside of the State of Florida, at the time of signing the Marital Settlement Agreement and at the time of entry of the Final Judgment. The parties, however, agreed to a specific schedule of visitation as outlined in the Marital Settlement Agreement. The Mother's move to Texas would certainly impede the parties ability to implement the parenting plan designed in the Marital Settlement Agreement.

17. The Court does not find a substantial change in circumstances and therefore, denies the Mother's Supplemental Petition for Modification.

18. Insufficient evidence of substantial change in circumstances was presented by the Father therefore, his Supplemental Petition for Modification is denied.

SECTION II. OTHER

1. The Court reserves jurisdiction to modify and enforce the Final Judgment.

2. The provisions of all final judgments or orders in effect remain the same.

ORDERED on December 9, 2004.

s/Monica L. Sierra
CIRCUIT JUDGE

COPIES TO:

Juliann Karenko, Esq.
Robert M. Geller, Esq.

APPENDIX C

Decision of State Trial Court on Remand

ORDER DENYING FORMER WIFE'S SUPPLEMENTAL PETITION TO RELOCATE

This cause came to be considered on March 23, 2006, on mandate fitftn the Second District Court of Appeals, dated January 27, 2006, which required this Court to reconsider the Former Wife's Supplemental Petition seeking to relocate with the minor children to the State of Texas, applying the proper standard under Florida Statute 61.13(2)(d)(4). After considering the record, this Court's Order of December 9, 2004, the Mandate issued by the Second District Court of Appeals, written argument presented by counsel, and being otherwise fully informed in the premises, hereby makes the following findings of fact and conclusions of law:

1. **On November 22 and 23, 2004, the Court heard Former Wife's Supplemental Petition for Modification, as well as the Former Husband's Supplemental Petition for Modification, of the Final Judgment of Dissolution of Marriage, dated October 14, 2002.**

2. **The Court issued an Order on December 9, 2004 denying both parties' supplemental petitions.**

3. On January 27, 2006, the Second District Court of Appeals found that the Court, in applying the factors of Florida Statute 61.13(2)(d) to determine whether the Former Wife's request for permission to relocate should be granted, misapplied the standard under Florida Statute 61.13(2)(d)(4). Specifically, the Court improperly measured the substitute visitation schedule against the visitation schedule provided in the Final Judgment.

4. The Second District Court of Appeals mandated the Court to reconsider the Petition using the proper standard of whether the substitute visitation schedule will be "adequate to foster a continuing, meaningful relationship between the child and the secondary residential parent."

5. The Court adopts all of the findings, except Paragraph 13, of the Order entered on December 9, 2004.

6. The Former Wife's proposed substitute visitation schedule provides for the Former Husband to have contact with the children during eight weeks of each summer, alternating holidays, any other time the Former Husband travels to Texas, and at least one phone call each week. The Former Wife offered to pay for the children's transportation costs for travel from Texas to Florida for Summer Visitation and Alternating Holidays; however, the Former

Husband would be responsible for his any visitation he enjoyed in Texas. Relying on Wilson v. Wilson 827 So.2d 401, 402 (Fla. 2nd DCA 2002) and Wiley v. Wiley 683 So. 2d 647, 650 (Fla. 4th DCA 1996), the Court finds that the substitute visitation proposed by the Former Wife would be adequate to foster a continuing, meaningful relationship between the children and the Father.

7. However, after considering the factors previously enumerated in the Order dated December 9, 2004, and after considering the factors of Paragraph Six above, the Court concludes that relocation would not be in the best interest of the children, even though it may be in the best interest of the Former Wife and her new husband. The Court finds that the proposed relocation does not benefit the children inasmuch as there has not been a showing that the proposed relocation would improve the children's school, family or even home life. See Berrebbi v. Clarke 870 So. 2d 172, 173 (Fla. 2d DCA 2004).

It is therefore, ORDERED AND ADJUDGED: The Former Wife's Supplemental Petition for Modification of the Final Judgment of October 14, 2002 is hereby DENIED.

DONE AND ORDERED in chambers in Tampa, Hillsborough County, Florida, on this 23rd day of March, 2006.

Monica L. Sierra
RCUIT JUDGE

OPIES TO:
onald Reed, Esq.
obert M. Geller, Esq.

APPENDIX D

Decision of State Supreme Court Denying Review and Denying Motion for Rehearing

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SUPREME COURT OF FLORIDA

MONDAY, OCTOBER 8, 2007

CASE NO.: SC07-1360
Lower Tribunal No(s).: 2D06-1674

LESLIE ANN FREDMAN
N/K/A LESLIE ANN MELTON,
Petitioner(s)

vs.

DAVID LYNN FREDMAN,
Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, and BELL, JJ. concur.

A True Copy
Test:

s/Thomas D. Hall
Clerk, Supreme Court

bm
Served:
ALLISON M. PERRY
ROBERT M. GELLER
HON. JAMES BIRKHOLD, CLERK
HON. PAT FRANK, CLERK
HON. MONICA LYNN SIERRA, JUDGE

APPENDIX E

Fla. Stat. § 61.13(2)(d), (2004)

Fla. Stat. § 61.13(2)(d), (2004)

(d) No presumption shall arise in favor of or against a request to relocate when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact and access with the secondary residential parent. In making a determination as to whether the primary residential parent may relocate with a child, the court must consider the following factors:

1. Whether the move would be likely to improve the general quality of life for both the residential parent and the child.

2. The extent to which visitation rights have been allowed and exercised.

3. Whether the primary residential parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements.

4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent.

5. Whether the cost of transportation is financially affordable by one or both parties.

6. Whether the move is in the best interests of the child.

APPENDIX F

Fla. Stat. § 61.13001(7) & (8), (2006)

Fla. Stat. § 61.13001(7) & (8), (2006)

Parental relocation with a child.—

(7) NO PRESUMPTION; FACTORS TO DETERMINE CONTESTED RELOCATION.--No presumption shall arise in favor of or against a request to relocate with the child when a primary residential parent seeks to move the child and the move will materially affect the current schedule of contact, access, and time-sharing with the non-relocating parent or other person. In reaching its decision regarding a proposed temporary or permanent relocation, the court shall evaluate all of the following factors:

(a) The nature, quality, extent of involvement, and duration of the child's relationship with the parent proposing to relocate with the child and with the non-relocating parent, other persons, siblings, half-siblings, and other significant persons in the child's life.

(b) The age and developmental stage of the child, the needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional

development, taking into consideration any special needs of the child.

(c) The feasibility of preserving the relationship between the non-relocating parent or other person and the child through substitute arrangements that take into consideration the logistics of contact, access, visitation, and time-sharing, as well as the financial circumstances of the parties; whether those factors are sufficient to foster a continuing meaningful relationship between the child and the non-relocating parent or other person; and the likelihood of compliance with the substitute arrangements by the relocating parent once he or she is out of the jurisdiction of the court.

(d) The child's preference, taking into consideration the age and maturity of the child.

(e) Whether the relocation will enhance the general quality of life for both the parent seeking the relocation and the child, including, but not limited to, financial or emotional benefits or educational opportunities.

(f) The reasons of each parent or other

person for seeking or opposing the relocation.

(g) The current employment and economic circumstances of each parent or other person and whether or not the proposed relocation is necessary to improve the economic circumstances of the parent or other person seeking relocation of the child.

(h) That the relocation is sought in good faith and the extent to which the objecting parent has fulfilled his or her financial obligations to the parent or other person seeking relocation, including child support, spousal support, and marital property and marital debt obligations.

(i) The career and other opportunities available to the objecting parent or objecting other person if the relocation occurs.

(j) A history of substance abuse or domestic violence as defined in s. 741.28 or which meets the criteria of s. 39.806(1)(d) by either parent, including a consideration of the severity of such conduct and the failure or success of any attempts at rehabilitation.

(k) Any other factor affecting the best

interest of the child or as set forth in s. 61.13.

(8) **BURDEN OF PROOF.**--The parent or other person wishing to relocate has the burden of proof if an objection is filed and must then initiate a proceeding seeking court permission for relocation. The initial burden is on the parent or person wishing to relocate to prove by a preponderance of the evidence that relocation is in the best interest of the child. If that burden of proof is met, the burden shifts to the non-relocating parent or other person to show by a preponderance of the evidence that the proposed relocation is not in the best interest of the child.